# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA, LLC d/b/a	)	
HAWAII TRIBUNE-HERALD	)	
	)	
	)	
AND	)	<b>CASES 37-CA-7043</b>
	)	37-CA-7045
	)	37-CA-7046
HAWAII NEWSPAPER GUILD,	)	37-CA-7047
LOCAL 39117,	)	37-CA-7048
COMMUNICATIONS WORKERS OF	)	37-CA-7084
AMERICA,	)	37-CA-7085
AFL-CIO		37-CA-7086
		37-CA-7087
		37-CA-7112
		37-CA-7114
		37-CA-7115
		37-CA-7186

RESPONSE OF *HAWAII TRIBUNE-HERALD* TO BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL ADDRESSING THE ISSUES PRESENTED BY THE BOARD IN ITS MARCH 2, 2011 NOTICE AND INVITATION TO FILE BRIEFS

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#### I. <u>INTRODUCTION</u>

On April 1, 2011, Counsel for the Acting General Counsel ("General Counsel") filed a brief in response to a March 2, 2011 Invitation of the Board in *Stephens Media*, *LLC d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011). Per the Invitation, *Hawaii Tribune-Herald* files this Brief in response to the General Counsel's brief. *Hawaii Tribune-Herald* again urges the Board to conclude that the statement taken by Supervisor Alice Sledge, at the direction of counsel, from employee Koryn Nako on October 19, 2005 was a witness statement excluded from production per the teachings of *Anheuser-Busch*, *Inc.*, 237 NLRB 982 (1978) and *Fleming Cos.*, 332 NLRB 1086 (2001). Separately and independently, *Hawaii Tribune-Herald* urges the Board to conclude that the statement was privileged from disclosure as attorney work-product.

#### II. <u>ARGUMENT</u>

## A. THE GENERAL COUNSEL ADDRESSED ISSUES SPECIFICALLY WITHDRAWN AND NOT IN THE BOARD'S INVITATION

In the "Background" portion of the General Counsel's brief, the General Counsel correctly identified the two issues on which the Board invited briefing, namely: 1) whether Koryn Nako's witness statement was a witness statement under *Fleming* and *Anheuser-Busch*; and 2) if not, whether it was nonetheless attorney work-product. (GC Br. at 2). However, the General Counsel advocates the abrogation of *Anheuser-Busch* and *Fleming*. (GC Br. 7-9).

The amicus brief filed by the United Food and Commercial Workers International

Union was even more direct, explicitly advocating the Board to overrule *Anheuser-Busch* and adopt the concurring opinion of *Fleming Cos*. (UFCW Br. at 9-14). The amicus brief filed by the American Federation of Labor and Congress of Industrial Organizations advocated the same. (AFL-CIO Br. at 6).

The General Counsel addressed an issue *withdrawn* by the Executive Secretary, at the direction of the Board. *Hawaii Tribune-Herald* inquired about the inconsistent notices of the Board dated March 2, 2011, sent to *Hawaii Tribune-Herald* and the General Counsel via facsimile and U.S. mail, and what appeared on the Board's website, thereafter. *Hawaii Tribune-Herald* inquired, on March 21, 2011, of the inconsistency and copied the General Counsel on the inquiry. The Executive Secretary then clarified and corrected the notice, explaining that what was posted on the website was "inaccurate." In spite of the correction, the General Counsel addressed the withdrawn issues. There is no excuse for the General Counsel to address an issue explicitly withdrawn by the Board. The General Counsel (and the amici) did not address only the issues raised by the Board; rather, the General Counsel and amici addressed an issue each apparently wanted to advocate, but that the Board removed from issue.

Should the Board adopt the position urged by the General Counsel (and amici), the Board's actions will constitute arbitrary and capricious agency action in violation of *Hawaii Tribune-Herald*'s due process rights. The witness statement taken by Supervisor Alice Sledge was exempt from disclosure pursuant to *Anheuser-Busch*; in addition, the witness statement taken at the direction of counsel was attorney work-product.

## B. THE BOARD SHOULD CONTINUE TO ADHERE TO THE ABSOLUTE EXCEPTION CARVED OUT BY ANHEUSER-BUSCH

The General Counsel directs the Board to *New Jersey Bell Tel. Co.*, 300 NLRB 42 (1990), enf'd 936 F.2d 144 (3<sup>rd</sup> Cir. 1991) in an effort to claim that Koryn Nako's statement was not a witness statement. (GC Br. at 6). The General Counsel demands that a witness statement be typecast as a "verbatim transcript or close approximation of the witness statement that is reviewed and adopted through his signature ..." (*Id*). The

transcript reflects that Supervisor Sledge transcribed what Nako said. (Tr. 1143). GC Ex. 6, the witness statement, was an accurate copy of that which Sledge drafted and Nako modified. (Tr. 1144). The document reflects what Nako said and – significantly – there was nothing Nako said that was not reflected in Nako's witness statement. (Tr. 1145). These facts meet the standard advocated by the General Counsel.

The General Counsel further argues that confidentiality is required for a statement to be a "witness statement" under Board precedent. This was never the case in *Anheuser-Busch*. Requiring an investigator to assure confidentiality reads into *Anheuser-Busch* an unnecessary requirement. There is no requirement to use "magic words" to express an intention to maintain confidentiality. In the instant case *Hawaii Tribune-Herald*'s maintenance of confidentiality caused the union to file the charge. The record is devoid of any evidence *Hawaii Tribune-Herald* did not maintain confidentiality.

In the General Counsel's zeal to discard *Anheuser-Busch* and adopt a balancing of interest tests described in *Detroit Edison*, 440 U.S. 301 (1979), the General Counsel glossed over the Court's teachings, and ignored the Board's rejection of this test in *Fleming Cos*. Significantly, *Detroit Edison* explained that a simple assertion by a union that it needs information *does not automatically require an employer to provide the requested information*. *See* 440 U.S. at 314. In order to demonstrate need, the burden falls upon the union to explain how and why the information is necessary. This was the circumstance in *Grinnell Fire Protection Sys. Co. v. NLRB*, 272 F.3d 1028, 1029-30 (8<sup>th</sup> Cir. 2001).

In *Anheuser-Busch*, the Board created an absolute exception<sup>2</sup> for witness statements due to the concern of coercion and intimidation of a witness; similarly there was no discovery contemplated in the arbitration process. The General Counsel advocates a new rule – especially given the circumstances of the instant case – that disregards employee interests in favor of union interests.

In this case, employee Koryn Nako on three separate occasions, refused Hunter Bishop attempting to interject himself into a meeting between Supervisor David Bock and employee Koryn Nako. Three times Bishop attempted to act as her representative; three times Nako said nothing. Only after *employee Nako* told Bishop that she would be okay and that she would call him if she needed him, did Bishop leave. (Tr. 968). Similarly, Nako met with Supervisor Sledge without requesting a union representative. (Tr. 1142). Nako voluntarily signed a statement regarding Hunter Bishop's actions – a statement that she modified. (Tr. 1143-46). Nako also met with Supervisor William Crawford without the aid of a union representative. Nako was a union shop steward. (Tr. 209). She was an agent of the union, as well as an employee. Significantly, at no time did Nako request a copy of her statement. (Tr. 1147). Given these facts, it was prudent for Hawaii Tribune-Herald to not disclose Nako's statement. Nako's demeanor in the meeting with Sledge and Higaki was described as "reticent" and she gave "brief, untypically brief" answers. (Tr. 1146-47). Nako never objected to signing the statement nor was she ever ordered to sign the statement.

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<sup>&</sup>lt;sup>2</sup> The General Counsel acknowledges that current case law "carved out an absolute exception for witness statements and summaries of these statements." *See* the General Counsel's brief at 5.

The General Counsel advocates discovery in an arbitration process, dressing up her argument as "information necessary [for unions] to properly perform their duties as bargaining representative, which includes the processing of grievances." (GC Br. at 8). The General Counsel fails to appreciate that in the context of the Act, discipline is within management's purview. "The question of proper discipline of an employee is a matter left to the discretion of the employer ..." *NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1025 (4<sup>th</sup> Cir. 1972) (internal citations omitted). The Act has never stood for the proposition that a union is on an equal footing as management when it comes to making business decisions. *See First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 767, 101 S.Ct. 2573, 2579, 69 L.Ed.2d 381 (1981). The General Counsel appears not to appreciate that a negotiated grievance and arbitration process is a union's ability to test the legitimacy of an employer's discipline.

The citation to the concurrence in *Fleming Cos.*, 332 NLRB 1086, 1089 (2000) was disingenuous. (GC Br. at 7-9). While it is true that parties have the ability to resolve grievances through a collectively bargained procedure, that does not demonstrate "a more mature and less contentious relationship," necessarily. Advocating the forced disclosure of a witness statement threatens the ability of a company to effectively investigate a claim. A company representative does not know, on the front end, what an interview will produce. If the interview produces a scandalous statement, for a multitude of reasons, the company may not wish to share the statement. On the other hand, if a statement has the ability to resolve a grievance before arbitration, then a company has the ability to share the statement with a union. A company decides whether to share a witness statement with a union at its peril; there are varying business reasons for deciding to provide a

witness statement or to not provide a witness statement. Creating an *obligation* to provide a witness statement, however, constitutes an impermissible interjection of the Board and policy on private enterprise. Much like collective bargaining<sup>3</sup>, where the Board is to referee the process, not inject itself into the substance of negotiations, *see H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970), the Board should not inject itself into the substance of a grievance and arbitration. By creating a rule forcing the disclosure of witness statements, the Board distances itself from a neutral application of the Act.

The General Counsel invited the Board to apply the Act in a lopsided<sup>4</sup> fashion. The General Counsel argued a one-sided paternalistic view of the issue claiming that "a restrictive view of disclosure unnecessarily *costs a union time and money* by forcing the 'union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. Nothing in federal law requires such a result.' *Fleming*, 232 NLRB at 1089 (concurrence)." (GC Br. at 9). The General Counsel's argument ignores the fact that a company also expends resources in the context of a grievance and arbitration and companies often file grievances against unions, as well. The risk and expense of arbitration is not one-sided, as suggested by the General Counsel. The General Counsel caps her unsolicited argument with a catch-all urging the Board "to

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<sup>&</sup>lt;sup>3</sup> There is nothing preventing a union from negotiating language in a collective bargaining agreement that compels an employer, upon request, to provide a witness statement. The Board should consider leaving this matter to the collective bargaining process, as well.

<sup>&</sup>lt;sup>4</sup> Should the Board adopt the General Counsel's argument and abrogate *Anheuser-Busch*, *Hawaii Tribune-Herald* expects an even application of the Act to compel unions to provide witness statements, notes, correspondence, etc. as part of a labor organization's bargaining obligations under Section 8(a)(3) of the Act. *Cook Paint and Varnish Co.*, 258 NLRB 1230 (1981) must similarly be abrogated (Union steward was under no obligation to answer company questions or turn over notes regarding representation of an employee during the grievance and arbitration process.).

adopt a general rule that witness statements, like other relevant information, should be disclosed to a *union* upon request." (GC Br. at 9). No aspect of the Act is effectuated through its lopsided application. The Board should adhere to the *Anheuser-Busch* categorical exception for witness statements.

## C. KORYN NAKO'S WITNESS STATEMENT IS PROTECTED BY THE ATTORNEY WORK-PRODUCT PRIVILEGE

The General Counsel treads on dangerous ground by advocating that this Article II forum can create standards inconsistent with legislatively enacted and judicially enforced tenets regarding privilege. Unequivocally, a document that does not meet the Board-created test as a "witness statement" can be attorney work-product. Congress enacted Federal Rule of Civil Procedure 26(b)(3) that explains, in relevant part:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, ensuror, or agent). ...

Fed. R. Civ. P. 26(b)(3). The work product privilege creates a "certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel [without which] the interests of the client and the cause of justice would be poorly served." *Hickman v. Taylor*, 329 U.S. 495 (1947). The General Counsel's contention that the Board does not accord work-product protection to documents not prepared on an attorney's instructions is an affront to the legislatively created and judicially interpreted concept of privilege. Recently, in *NLRB v. Interbake Foods*, *LLC* – F.3d – (4<sup>th</sup> Cir. 2011), the court went to great lengths explaining division of power between the NLRB and Article III courts. In *Interbake*, in the context of a subpoena, the General Counsel demanded documents that were attorney work-product or privileged. The court acknowledged, "Board adjudicators

are authorized to make rulings on questions of privilege" but the agency "has no power to require the production of documents for an in camera review or for admission into evidence" upon refusal as that requires Article III power. *Interbake*, slip op. at 4-6 (extensive citations omitted). The same limitation attaches to witness statements.

It is beyond cavil that the attorney work-product privilege applies to a witness statement "prepared by either the client, his attorney or another representative." *EEOC v. Rose Casual Dining, LP*, 2004 WL 231, 287 \*2 (E.D. Pa. 2004)(quoting *Advanced Tech Assoc., Inc. v. Herley Indus., Inc.*, 1996 WL 711018 at \*6 (E.D. Pa 1996) "witness statements prepared at the direction of counsel in anticipation of litigation ... are classic examples of attorney work-product ..."). The instant case is identical. Alice Sledge prepared Nako's witness statement at the direction of counsel in anticipation of litigation.

The General Counsel argued that Alice Sledge only testified that the meeting with Nako was at the "suggestion" of counsel, and this did not demonstrate that the meeting was at the direction of counsel. (GC Br. at 3, 11). This is preposterous. The General Counsel's cheap attempt to play a game of semantics downplays the fact that Sledge met with Nako not on her own accord nor as a matter of ordinary business, but due to the advice and direction of counsel. Additionally, Sledge wrote, atop the witness statement, "prepared at the advice of counsel in preparation for arbitration." (GC Ex. 6). In addition, Sledge and Higaki met with Nako *after Hawaii Tribune-Herald* suspended Hunter Bishop. Hunter Bishop has been the subject of *six* arbitrations in the prior 36 months. (R. Ex. 317, 318, 319, 320, 321, 322). Guild Local 39117 filed a grievance *the same day Hawaii Tribune-Herald* suspended Bishop and met with Nako. By any reasonable assessment, the specter of litigation had been raised. *Hawaii Tribune-Herald* 

anticipated that Guild Local 39117 would file a grievance; the resulting facts supported this belief.

Significantly, the General Counsel, in citing the dissent of former member Walsh in Central Tel. of Tx., 343 NLRB 987, 991 (2004) demonstrated how Nako's witness statement was protected under the attorney work-product doctrine even under her minority theory. The primary motivation behind Nako's witness statement was to aid in future litigation or it was prepared "because of" expected litigation. (GC Br. at 12). Incredibly, the General Counsel complains that taking advantage of the legislatively created privilege is somehow unfair because it "would prevent a union from obtaining documents that would enable it to fully perform its duties as a bargaining representative." (GC Br. at 12). The General Counsel's biased and paternalistic bent on the applicability of privilege in the context of a labor dispute is shameful. Privileged information may be relevant; however the work-product privilege trumps possible relevance. Given the General Counsel and Board's fervor in protecting witness statements prepared by a Region during an investigation of an unfair labor practice charge, the General Counsel's inconsistency is striking. See H.B. Zachary Co., 310 NLRB 1037 (1993)(employer request of union-possessed copies of Board affidavits denied under theory of privilege).

Nako's witness statement is privileged attorney work-product exempt from production pursuant to the Federal Rules of Evidence. *See* F.R.E. 501 and 502(g). Section 102.39 of the NLRB's Rules and Regulations states:

Rules of evidence controlling so far as practicable. – Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934

The Federal Rules of Evidence are a Congressional mandate. The Federal Rules of Evidence explain that privilege applies to Nako's witness statement, as a matter of law. The Board should apply the Federal Rules of Evidence to conclude that Nako's witness

statement was protected under the attorney work-product doctrine. There is no justifiable reason for the Board to break from legislative direction and judicial interpretation, as

urged by the General Counsel.

III. **CONCLUSION** 

WHEREFORE, for the reasons explained in this Responsive Brief and the reasons

explained in its initial Brief, and for any additional reasons deemed appropriate by the

Board, Hawaii Tribune-Herald respectfully requests that the Board find that the October

19, 2005 statement of Koryn Nako was in fact a witness statement protected from

disclosure under the existing precedent of Anheuser-Busch, Inc.; independently, Hawaii

Tribune-Herald respectfully requests that the Board find that the October 19, 2005

witness statement obtained by Advertising Director Alice Sledge taken at the direction of

counsel in anticipation of litigation was privileged from disclosure as attorney work-

product pursuant to *Central Tel. of Tx*.

Dated: April 15, 2011

Nashville, Tennessee

Respectfully submitted,

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#### IV. <u>CERTIFICATE OF SERVICE</u>

I, the undersigned, hereby certify that on this 15<sup>th</sup> day of April, 2011, I served the foregoing Response of *Hawaii Tribune-Herald* to Brief of Counsel for the Acting General Counsel Addressing the Issues Presented by the Board in Its March 2, 2011 Notice and Invitation to File Briefs, via the Board's electronic filing system and via e-mail, upon the following:

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